



MEMORANDUM

To: Susan Crawford
Haley VanDyck

Re: COMPTEL Wish List for FCC Reform

Date: December 19, 2008

To follow up on our telephone conversation yesterday, we have outlined below COMPTEL's position on certain issues that we hope the new Administration will address on a priority basis to remedy the lack of transparency and due process in the FCC's decision making processes as well as to promote the continued development of competition in the telecommunications industry.

I. Process Reform

The FCC currently classifies virtually all proceedings, with the exception of adjudicatory and enforcement proceedings, as "permit but disclose" proceedings. Although the Commission may set deadlines for the filing of comments and reply comments, the deadlines are meaningless because the Commission will continue to meet with interested parties and accept written *ex partes* in these dockets until a decision is adopted/issued (if the item is voted on circulation) or the Sunshine Period begins. Once an item has been sunshined, interested parties are prohibited from making *ex parte* contacts with the FCC until after a decision has been released unless the FCC initiates the contact. 47 C.F.R. §1204(a)(10). This allows the FCC to unilaterally determine behind closed doors not only which party will have the final say on any contentious issue, but also which parties will be prohibited from responding to any such presentation. Obviously, such a process is subject to abuse and in fact has been abused over the last several years. The Commission should amend the rules to eliminate Section 1204(a)(10). To the extent the Commission needs additional information on an issue before making a decision, it should allow all interested parties the opportunity to comment.

Allowing the records of rulemaking and other proceedings to remain open indefinitely removes any pressure to act and leads to unacceptable delays by the Commission in reaching decisions.¹ The Commission's *ex parte* process encourages parties to make oral and written

¹ Rulemaking proceedings often languish for years with no action. *See e.g., In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) where the Court criticized as

presentations right up until the day an item is circulated² or a decision is adopted on circulation³ and denies other interested parties an opportunity to respond. The Commission should make its decision making processes far more efficient, transparent and fair by closing the record of a proceeding after reply comments are filed. It can then proceed in a timely manner to analyze the record and issue a decision based on that record, as other federal agencies do.

The current FCC has been characterized by a lack of collegiality among the members which has made working toward consensus on contentious issues a very difficult process. Exacerbating the problem are the provisions of the Communications Act and the Administrative Procedure Act that prohibit more than 2 Commissioners from meeting on Commission business except on the public record. Repeal of these statutory provisions would make it far easier for the Commissioner to work together as a team and reach compromises on difficult issues.

II. The Need For Rules To Govern The Forbearance Process

One unfortunate consequence of the Commission's unreasonable delays in acting on rulemakings and other proceedings has been the incentive it has created for incumbent local exchange carriers (ILECs) to use the Section 10 forbearance process⁴ to petition for regulatory relief. Under the statute, the Commission must deny a forbearance petition within one year of its filing (which period may be extended by 90 days) or the petition is deemed granted. The

unconscionable the FCC's six year delay in responding to the Court's remand of the ISP intercarrier compensation rulemaking decision.

² The Commission often incorporates such last minute *ex partes* into its decisions. A recent example is the network architecture rules set forth in ¶ 275 of Appendix A of the *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-262 (rel. Nov. 6, 2008) in the Commission's intercarrier compensation and universal service reform proceedings. Those rules were taken word for word from an *ex parte* submitted by AT&T and Verizon on October 14, 2008, the day before the draft Order was put on circulation. See Letter from Hank Hultquist, AT&T Services, Inc., and Donna Epps, Verizon, to Marlene Dortch, filed in CC Docket No. 01-92 on October 14, 2008. An additional architecture rule was added to the draft Order circulated on November 5, 2008. See Appendix C at ¶ 270. That language of that rule, was taken virtually word for word from an *ex parte* filed by Stuart Polikoff on behalf of OPASTCO and the Western Telecommunications Alliance ("WTA") on October 29, 2008. See Letter from Stuart Polikoff to Marlene Dortch filed in CC Docket No. 01-92, *et al.* on October 29, 2008.

³ See *e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) ("*Omaha Forbearance Order*"), at n. 155, 188, 189 (showing that the Commission relied on evidence filed the day the decision was adopted), *aff'd. sub nom. Qwest Corporation v. Federal Communications Commission*, 482 F. 3d 471 (D.C. Cir.2007); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007) ("*Verizon 6 MSA Forbearance Order*"), at n. 88, 91, 127 (showing that the Commission relied on evidence filed the day before the decision was adopted).

⁴ 47 U.S.C. § 160.

mandatory deadline forces the Commission to act and has encouraged the ILECs to use the forbearance process, rather than a rulemaking or other proceeding of general applicability, to ask the Commission to refrain from enforcing statutory and regulatory obligations. COMPTEL intends to work with Congress to repeal Section 10.

As long as Section 10 remains in force, the very least the Commission should do is adopt procedural rules governing the pleading process that will promote fairness and transparency. Although Section 10 was added to the Communications Act over 12 years ago, the only rule the Commission has adopted to implement that Section merely provides that petitions for forbearance shall be identified as such in the caption and shall be filed as separate pleadings.⁵ ILECs have filed numerous forbearance petitions in recent years seeking very broad relief, including relief from the entirety of Section II of the Communications Act, Section 251 of the Act and dominant carrier regulation. Nonetheless, the Commission has yet to adopt procedures setting forth pleading guidelines and the standards that a petitioning party must meet.

Over one year ago, a group of competitive carriers filed a Petition for Rulemaking asking the Commission to adopt rules governing the forbearance pleading process.⁶ Although the pleading cycle closed over eight months ago, the Commission has yet to issue rules or explain why none are needed. The Commission should act on the Petition without delay and adopt rules consistent with those proposed by the competitive carriers. Although COMPTEL would like to see Congress repeal Section 10, as long as it remains in force, the Commission should adopt rules that establish parameters for the filing of forbearance petitions.

III. The Commission Must Conclude The Special Access Rulemaking

The Commission initiated a rulemaking proceeding over three years ago to examine whether the rules on the pricing of special access services needed revision. It has yet to adopt an order in that proceeding. Because the pricing of special access services impacts a broad swath of the economy, COMPTEL urges that priority be given to the special access docket. Based on a study performed on behalf of the AdHoc Telecommunications Users Committee, which represents large business end-users, fixing special access pricing can be expected to result in a savings to business customers of \$22.7 million per day.⁷

Special access is at least a \$16 billion service industry,⁸ the price and quality of which impacts effectively all other telecommunications and information services, as well as virtually all other industries that use telecommunications and information services, including finance and national defense. For example, banks use special access to send and receive credit card and other financial transaction data; and wireless service providers use special access to carry traffic between cell sites and switches. The cost of special access substantially impacts the prices of

⁵ 47 C.F.R. § 1.53.

⁶ *See Notice of Proposed Rulemaking*, WC Docket No. 07-767 (rel. Nov. 30, 2007).

⁷ Comments of the Ad Hoc Telecommunications Users, filed August 8, 2007 with the Federal Communications Commission, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier*, WC Docket No. 05-25, *et al*, at 6.

⁸ “FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,” GAO-07-80 Deregulation of Access Services, p.44, November 2006 (“GAO Report”).

these services and ultimately has a significant impact on the economy as a whole. Indeed, Economics and Technology, Inc. demonstrated that during the period 2007 through 2009 properly regulated special access rates would have allowed the U.S. economy to grow by 234,000 new jobs and \$66 billion in GDP.⁹

The ILECs' special access rates (both the "rack" and "discount" rates) are not only exorbitant, but the ILECs also impose egregious terms and conditions on purchasers who elect "discount" pricing. The Commission should reinstitute price caps or an alternative means to provide lower prices and provide immediate relief from the existing "market failure" and should also put in place the seeds of market-based remedies that will ameliorate the need for price regulation over time.

A. Bring prices more in line with what a competitive market would produce

- a. Determine competitive rate levels by using rates charged by competitive carriers, TELRIC, or price caps.
- b. Eliminate Mileage Charges.

B. Prohibit anticompetitive practices, price and term "discount" contract structures and penalties that lock in purchasers at supracompetitive prices.

- a. Unitary pricing regime—TELRIC style—meaning no term or volume discounts which require the purchaser to accept anticompetitive terms and conditions..
- b. Prohibit the bundling of channel terminations with mileage or any other service such as Ethernet. In other words, every transmission service must be available a la carte.
- c. Eliminate Phase II pricing flexibility.

1. Current prices are too high:

The incumbents have used their market dominance to maintain supracompetitive rates for special access services. Significantly, as the FCC has granted Phase II pricing flexibility to the largest incumbent LECs due to the existence of "competition," special access prices have increased – exactly the opposite result of what a truly competitive market would produce. A report done by the United States Government Accountability Office ("GAO Report") states that "in areas where FCC granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues tend to be higher than or the same as list prices and average revenues in areas still under some FCC price regulation."¹⁰

⁹ Lee L. Selwyn et al., Economics and Technology, Inc., Special Access Overpricing and the US Economy: How Unchecked RBOC Market Power is Costing US Jobs and Impairing US Competitiveness, at iii (Aug. 2007).

¹⁰ GAO Report, "What GAO Found."

In addition, special access rates are substantially higher than the cost-based rates charged for the same facilities sold as unbundled network elements. For instance, a declaration submitted to the Commission by McLeodUSA Telecommunications Services, Inc. demonstrated that a DS1 special access circuit in a particular area was priced at 138% more than the UNE rate.¹¹ Even if the carrier availed itself to the discounts provided through the incumbent's exclusionary contract offering (which requires that the customer purchase 90% of its entire demand throughout the incumbent's 13-state region from the incumbent), the discounted price was still 91% to 111% higher in certain areas.¹² As such, it will come as no surprise that the AT&T, Qwest, and Verizon rates of return for 2007 were 138%, 175%, and 62%, respectively.¹³

2. **Exclusionary Contracts, i.e., “Discount Plans,” Prevent Competition from Developing.**

The key feature of the incumbents' discount plans is that in order to get “discounts” on circuits for which a purchaser has no competitive alternative (the vast majority of circuits), the purchaser must commit to buying the vast majority of its total circuit demand from the ILEC. This condition precludes purchasers from buying from a competitor where a less expensive alternative may be available. It also may deter competitive carriers from building their own facilities because doing so may cause their special access purchases to fall short of the volume commitments needed under their existing (potentially long-term) agreements. The negative impacts such exclusionary contract terms have on competition have been demonstrated in the special access rulemaking proceeding. For example, PAETEC Communications showed that its dependence on ILEC special access services is rising and exceeds 98 percent in Phase II Pricing Flexibility areas despite vigorous and concentrated efforts by PAETEC to find alternative special access providers.¹⁴ Sprint Nextel showed that it relied on incumbent LEC special access services for 96.4% of its DS1 and DS3 customer terminating circuits (including circuits

¹¹ Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, Eben Declaration at 2-3 (filed Jul. 23, 2007)(“Eben Declaration”). [“[T]he monthly recurring charge (“MRC”) for a Zone 1 DS1 UNE loop is \$74.88, plus a \$1.54 cross-connect charge, for a total MRC of \$76.42. In contrast, the Zone 1 MRC for a DS1 special access channel termination is \$165.00, plus a \$17.22 cross-connect charge, for a total MRC of \$182.22.”]

¹² Eben Declaration at 5-6.

¹³ ARMIS Report 43-04, column (o), row 8041 divided by row 8040. Column (o) reports Special Access results, row 8041 is Net Return, and row 8040 is Average Net Investment.

¹⁴ Comments of PAETEC Communications, Before the Federal Communications Commission, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier*, WC Docket No. 05-25, *et al* at 5-6 (filed Aug. 8, 2007); *See also*, Comments of Sprint Nextel, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 30 (filed Aug. 8, 2007)[“In Phase II price flexibility areas: 97.2% of all Sprint Nextel's DS1s were purchased from the incumbent LEC.”]

terminating at cell sites) in the top 50 MSAs in 2006. In Phase II Pricing Flexibility areas, Sprint Nextel purchased 97.2% of its DS1s from the incumbent LEC.¹⁵

If left unaddressed, this pricing problem could get substantially worse because the merger conditions - which prevented AT&T and Verizon from raising their rates for special access services - are due to expire in January of 2010. Given that special access is likely the biggest operational expense for some carriers, allowing AT&T and Verizon to raise their rates has the potential of allowing them to drive carriers reliant on their special access services out of business, something this economy cannot afford.

IV. Copper Loop Retirement

Copper loops make up the ubiquitous legacy local loop plant, which reaches more than 100 million U.S. households and nearly all businesses. Copper loops are used to provide not only voice service, but also competitive ultra-high-speed broadband and “triple play” offerings, including HDTV and Video-on-Demand. They support broadband speeds of 10, 25 and even 50 Mbps.

Copper loops provide a line-powered redundant loop plant for public safety. Unlike fiber facilities, copper loops conduct electricity. When the electricity supply is interrupted, they work on a central office back-up power supply. Copper Loops are the “third wire” into homes and businesses and remain a robust competitive alternative to fiber, cable and wireless.

Current FCC rules (Part 51) require incumbent carriers only to disclose their intent to retire a copper loop. There is limited opportunity for consumers and affected companies to object to the proposed copper retirement. As a result, potentially critical network infrastructure, which could be used to provide alternative services to consumers, could be lost without meaningful review. This would lead to a reduction in network competition AND decreased broadband availability as well as a loss of redundant facilities which are essential for homeland security purposes and to address natural disasters.

On a priority basis, the FCC should open a formal proceeding to determine whether copper retirement serves the public interest and is consistent with national security concerns.

V. Intercarrier Compensation Reform

COMPTEL’s membership is diverse and there are many issues in the intercarrier compensation reform proceeding on which we do not have consensus. There are two critical proposals in the draft orders put out for comment, however, that COMPTEL submits would jeopardize the statutory rights conferred on competitive carriers by Congress. First, the network

¹⁵ Comments of Sprint Nextel, Before the Federal Communications Commission, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier*, WC Docket No. 05-25, *et al* at 30 (filed Aug. 8, 2007)[“In Phase II price flexibility areas: 97.2% of all Sprint Nextel’s DS1s were purchased from the incumbent LEC.”] “Even in large urban areas, Sprint Nextel remains dependent on incumbent LEC special access to meet its DS1 and DS3 needs. For example, in 2006, 98% of Sprint Nextel’s DS1 and DS3 circuits in Chicago were purchased from AT&T; 97% of Sprint Nextel’s DS1 and DS3 circuits in Boston were purchased from Verizon; and 99% of Sprint Nextel’s DS1 and DS3 circuits in San Francisco were purchased from AT&T.” *Id.*

architecture rules proposed by AT&T and Verizon that the Commission incorporated in its draft orders are fundamentally inconsistent with the interconnection rights granted by Congress in Section 251(c)(2) of the Act, and the Commission's implementing rules which give CLECs the right to choose the points at which they will interconnect with the incumbent LEC.¹⁶ CLECs and ILECs are currently operating under well established interconnection agreements that are the product of negotiation and arbitration and it is not necessary for the Commission to adopt default interconnection rules to interfere with those agreements in order to implement intercarrier compensation reform.

Second, COMPTTEL is very concerned about the Commission's proposal to "classify as 'information services' those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks (collectively 'IP/PSTN' services)."¹⁷ Sections 251 and 252 of the Communications Act are technology neutral – they do not distinguish between services provided over IP-based networks and those provided over circuit-switched networks. Contrary to the Act, the Commission proposes to create regulatory distinctions based solely on the technology used to transmit voice communications. Aside from the legal and technological infirmities with its reasoning, if the Commission classifies all IP/PSTN traffic as "information services," it will jeopardize competitors' rights to obtain interconnection and unbundled network elements under Section 251 of the Act. Section 251(c)(2) of the Act imposes on ILECs the duty to provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the ILEC's network for the transmission and routing of *telephone exchange service and exchange access*. Section 251(c)(3) imposes on ILECs the duty to provide to any requesting telecommunications carrier *for the provision of a telecommunications service* nondiscriminatory access to unbundled network elements. Because an information service is not a telephone exchange service, an exchange access service or a telecommunications service, the effect of the Commission's classification will be to eliminate the Congressionally granted rights of competitive carriers to interconnection and access to unbundled network elements. Again, because it is not necessary for the Commission to classify IP/PSTN traffic as an information service in order to implement intercarrier compensation reform, COMPTTEL urges the Commission to defer judgment on this issue until it considers the statutory implications of so broadening the definition of information services.

¹⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 at ¶ 209; *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001) ("the CLEC cannot be required to interconnect at points where it has not requested to do so").

¹⁷ Appendix A at § 209; Appendix C at § 204.